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Standard Chartered Bank Malaysia Bhd v Mohd Nazro bin Zulkipeli and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS C-02–329 OF 2007 AND C-02–330 OF 2007
ZALEHA ZAHARI, RAUS SHARIF AND ABU SAMAH JJCA
27 FEBRUARY 2009

Land Law — Charge — Order for sale — Cause to contrary — Whether chargor served with notices in Form 16D and summons to attend enquiries by Land Administrator — Whether chargor informed of decision of Land Administrator — Whether affidavit filed to rebut chargor's assertions — Whether cause to contrary established

Land Law — Charge — Order for sale — Land held under land office title — Unsuccessful auctions at land office — Application to High Court to substitute land administrator's order for sale — Whether court obliged to make order of sale if cause to contrary shown — National Land Code s 265(3)

Land Law — Charge — Order for sale — Order by land administrator — Subsequent application by chargee to High Court to substitute order for sale — Whether validity of land administrator's order for sale may be challenged during application for substitution

The appellant had granted term loan facilities to the respondents in both appeals. As security for the said loans, the respondents had charged to the appellant pieces of lands held under land office titles. Both respondents defaulted in the repayment of the facilities. Upon applications by the appellant, the land administrator made orders of sale in both the cases. Both respondents were not present at the enquiries before the land administrator. Two public auctions were then held in respect of each land but were called off as there were no bidders. The land administrator then issued certificates of reference in respect of each land pursuant to s 265(3)(b) of the National Land Code ('the Code') for the determination by the High Court. In consequence thereof, the appellant filed originating summonses for orders under s 265(3)(c) of the Code to substitute the order of sale by the land administrator with an order for sale by the court. The originating summonses were served on the respective respondents and the respondents filed their affidavits-in-opposition disputing the orders of sale made by the land

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administrator. They contended that they were not served with the necessary notices in Form 16D as prescribed by s 254 of the Code and that they were not served with the summons to attend the enquiries held by the land administrator pursuant to s 261(1) of the Code. They claimed that such non-compliance with the mandatory provisions of the Code constituted cause to the contrary. The learned High Court found that there was cause to the contrary and accordingly dismissed both applications for orders of sale. The appellant appealed against these decisions.

Held, dismissing both the appeals with costs:

(1) The court is not obliged to make an order of sale under s 265(3) read with s 256 of the Code if it is satisfied that there is in existence cause to the contrary. The court's power under s 256(3) is not only limited to substituting the order for sale of the land administrator with its own order for sale but it can decline to make an order for sale if it is satisfied of the existence of cause to the contrary (see para 15).

(2) The chargor may show cause to the contrary by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. Failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary (see para 16).

(3) The respondents had never been served with notices in Form 16D. They were also not served with the summons to attend the enquiries held by the land administrator under s 261 of the Code to show cause why the orders of sale should not be made against them nor were they informed of the decision of the land administrator. The appellant did not file any affidavit in reply to rebut the respondents' assertions. The learned High Court judge thus did not err in law or in fact in arriving at his decision (see para 17).

[Bahasa Malaysia summary

Perayu telah memberikan kemudahan pinjaman bertempoh kepada responden-responden dalam kedua-dua rayuan. Sebagai jaminan kepada pinjaman tersebut, responden telah menggadaikan kepada perayu tanah-tanah yang berada dalam pegangan hak milik pejabat tanah. Kedua-dua responden mungkir dalam pembayaran semula kemudahan tersebut. Atas permohonan daripada perayu, pentadbir tanah membuat perintah jualan dalam kedua-dua kes. Kedua-dua responden tidak menghadiri siasatan oleh pentadbir tanah. Dua lelongan awam dijalankan bagi setiap tanah tersebut tetapi dibatalkan kerana ketiadaan pembida. Pentadbir tanah kemudiannya mengeluarkan sijil rujukan untuk setiap tanah

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tersebut menurut s 265(3)(b) Kanun Tanah Negara ('Kanun') untuk ditentukan oleh Mahkamah Tinggi. Berikutan dengan itu, perayu memfailkan saman pemula bagi perintah di bawah s 265(3)(c) Kanun untuk menggantikan perintah jualan oleh pentadbir tanah dengan perintah jualan oleh mahkamah. Saman pemula disampaikan kepada responden-responden dan responden-responden memfailkan afidavit tentangan yang mempertikaikan perintah jualan oleh pentadbir tanah. Mereka menghujah bahawa mereka tidak disampaikan notis yang sepatutnya dalam Borang 16D seperti yang dinyatakan oleh s 254 Kanun dan bahawa mereka tidak disampaikan dengan saman untuk menghadiri siasatan yang dijalankan oleh pentadbir tanah menurut s 261(1) Kanun. Mereka mendakwa bahawa ketakpatuhan dengan peruntukan mandatori Kanun tersebut merupakan sebab sebaliknya. Hakim Mahkamah Tinggi yang bijaksana mendapati terdapat sebab sebaliknya dan dengan itu menolak kedua-dua permohonan untuk perintah jualan. Perayu merayu terhadap keputusan tersebut.

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Mahkamah tidak berkewajipan untuk membuat perintah jualan di bawah s 265(3) dibaca bersama s 256 Kanun sekiranya terdapat sebab sebaliknya. Kuasa mahkamah di bawah s 256(3) tidak hanya terhad kepada menggantikan perintah jualan oleh pentadbir tanah dengan perintah jualannya sendiri tetapi mahkamah boleh menolak untuk membuat perintah jualan sekiranya terdapat sebab sebaliknya (lihat perenggan 15).

(2) Penggadai boleh menunjukkan sebab sebaliknya dengan membuktikan bahawa pemegang gadaian gagal untuk memenuhi syarat-syarat terdahulu untuk membuat permohonan perintah jualan. Kegagalan di pihak pemegang gadaian untuk membuktikan bahawa tuntutan atau penyampaian notis kepada penggadai dalam Borang 16D merupakan sebab sebaliknya (lihat perenggan 16).

(3) Responden-responden tidak pernah disampaikan dengan notis dalam Borang 16D. Mereka juga tidak disampaikan dengan saman untuk menghadiri siasatan yang dijalankan oleh pentadbir tanah di bawah s 261 Kanun untuk menunjuk sebab kenapa perintah jualan tidak patut dibuat terhadap mereka atau dimaklumkan mengenai keputusan pentadbir tanah. Perayu tidak memfailkan sebarang afidavit balasan untuk menolak penegasan responden. Oleh itu hakim Mahkamah Tinggi tidak khilaf dalam undang-undang atau fakta dalam membuat keputusannya (lihat perenggan 17).]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

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Cases referred to

Arab Malaysia Finance Bhd v Shamsuddin bin Hj Ahmad & Anor [1998] 5 MLJ 337; [1997] 4 CLJ Supp 469, HC (refd)

Lee Gee Pheng v RHB Bank Bhd [2004] 1 MLJ 618; [2003] 4 CLJ 639, CA (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 1 AMR 1036, FC (refd)

Ng Hee Thong & Anor v Public Bank Bhd [1995] 1 AMR 622, CA (refd)

Legislation referred to

National Land Code ss 254, 256, 256(3), 260(2), 261, 261(1), 265(3), 265(3)(b), (3A), 418, Forms 16D, 16G

Rules of the High Court 1980 O 83 r 3

Appeal from: Originating Summons No 24–18 of 2006 (High Court, Kuantan)

Vignesh Kumar (Syazlinda Nadia Mohd Nasir with him) (Balendran Chong) for the appellant.

Bastian Verdargon (R Sarengapani with him) (Vendargon & Partners) for the respondent.

Abu Samah JCA (delivering judgment of the court):

[1] There are two appeals before us, namely, Civil Appeal No C-02–329 of 2007 ('the first appeal') and Civil Appeal No C-02–330 of 2007 ('the second appeal'). Standard Chartered Bank Malaysia Bhd is the appellant in both appeals. Both parties have agreed that the appeals be heard together. The appeals are against the decision of the learned High Court judge who dismissed both the appellant's applications for an order of sale under s 256(3) of the National Land Code ('the Code') pursuant to two certificates of reference by the land administrator under s 265(3)(b) of the Code.

[2] Briefly, the facts are as follows. On 12 May 2000, the appellant granted a term loan facility of RM395,200 to the respondent in the first appeal. As security for the said loan the respondent charged a piece of land held under HS(M) No 42008 PT No 46393, Mukim of Kuala Kuantan, District of Kuantan, Pahang.

[3] On 17 October 2000, the appellant granted a term loan facility of RM443,394.50 to the respondent in the second appeal. As security for the said loan, the respondent charged a piece of land held under HS(M) 42029 PT 46413 Mukim of Kuala Kuantan, District of Kuantan, Pahang.

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[4] The respective land charged as security for the loan in both appeals are lands held under land office titles. A

[5] Both respondents had defaulted in the repayment of the said facilities. Upon applications by the appellant in Form 16G for orders of sale under s 260(2) of the Code, the land administrator held separate enquiries under s 261(1) of the Code. Both respondents were not present at the enquiries before the land administrator. B

[6] On 7 September 2004 the land administrator made an order of sale in respect of the land charged by the respondent in the first appeal. On 6 October 2004 the land administrator made an order of sale in respect of the land charged by the respondent in the second appeal. C

[7] Two public auctions were held in respect of each land by the land administrator. However they were called off as there were no bidders. The land administrator then issued a certificate of reference in respect of each land pursuant to s 265(3)(b) of the Code for the determination by the High Court. D

[8] In consequence thereof, the appellant filed two separate applications by way of originating summonses for an order under s 265(3)(c) of the Code to substitute the order of sale by the land administrator with an order for sale by the court under s 256(3) of the Code. Both originating summonses were served on the respective respondents. E F

[9] It was only at this stage that the respondents filed their affidavits in opposition disputing the orders of sale made by the land administrator. They contended that they were not served with the necessary notices in Form 16D as prescribed by s 254 of the Code requiring them to remedy the default within the specified period nor were they notified and served by the land administrator with the summons to attend the enquiries held by the land administrator pursuant to s 261(1) of the Code. They accordingly submitted that such non-compliance with the mandatory provisions of ss 254 and 261 of the Code constituted cause to the contrary which rendered the orders of sale by the land administrator null and void: see *Low Lee Lian v Ban Hin Lee Bank Berhad* [1997] 1 MLJ 77; [1997] 1 AMR 1036. The appellant did not file any affidavit in reply to rebut the respondents' contention. G H

[10] The appellant however contended that the decision in *Low Lee Lian v Ban Hin Lee Bank Berhad*, was inapplicable as it concerned an order of sale of land held under the registry title and not land held under the land office title as in the present appeals. It was further contended that as the originating summons under s 265(3) of the Code was merely a continuation of the I

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proceedings held before the land administrator the respondents should have filed an appeal under s 418 of the Code to challenge the orders of sale issued by the land administrator. Learned counsel for the appellant cited *Arab Malaysia Finance Bhd v Shamsuddin bin Hj Ahmad & Anor* [1998] 5 MLJ 337; [1997] 4 CLJ Supp 469 and *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618; [2003] 4 CLJ 639.

[11] In *Arab Malaysia Finance Berhad v Shamsuddin Ahmad & Anor*, the land administrator made an order of sale pursuant to the plaintiff's application under s 260 of the Code and subsequently held two public auctions which were unsuccessful as there were no bidders. Consequently the land administrator referred the matter to the court pursuant to s 265(3)(b) of the Code. The plaintiff then filed an originating summons in the High Court for an order of sale under s 256(3) of the Code. The defendant, as the chargor, opposed the application on the ground, inter alia, that there was non-compliance with O 83 r 3 of the Rules of the High Court 1980 and that there was cause to the contrary. The issue before the court was whether s 256 of the Code was relevant, as the land in question was held under the land office title and not under the registry title. The court nevertheless allowed the plaintiff's application and held that s 256 of the Code was irrelevant. Hishamudin Yunus J at p 473 said:

> To my mind, s 256 and O 83 are irrelevant as far as the present application is concerned. This is because s 256 provides the procedure to be adopted for the sale of land held under a registry title whereas the title of the property in question is a land office title. It was not legally possible for the plaintiff to have, in the first place, proceeded under s 256 and O 83. In fact in the present case it had in the first place, correctly proceeded under s 260 by applying for an order for sale from the land administrator.

And at p 475 the learned judge emphatically said:

> This reference to s 256 is, to my mind, merely to confer upon the court the power to substitute for an order of sale of the land administrator an order of sale by the court *as if* the court's order is made under s 256. This entails making incidental orders on matters such as determining the reserve price and/or directing the registrar of the High Court to carry out the sale in accordance with the provisions of s 257.

[12] In *Lee Gee Pheng v RHB Bank Bhd*, the chargee/bank had earlier granted the chargor/borrower a housing loan of RM80,000 which was secured by a charge over a piece of land held under land office title. The borrower defaulted in the repayment of the loan and the bank served a notice in Form 16D on her. Thereafter the bank applied to the land administrator for an order for sale under s 260 of the Code. This was granted by the latter. After two unsuccessful public auctions, the land administrator referred the

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matter to the court under s 256 of the Code. The court allowed the bank's application for an order of sale by public auction. The borrower appealed but later withdrew it. Subsequently the borrower applied to set aside the order of sale. The High Court dismissed it and the borrower appealed against the said decision. The Court of Appeal dismissed the appeal with costs. Nik Hashim JCA (as he then was) at p 644 said:

> The procedure for sale prescribed under s 265(3) is merely a continuation of the proceeding of transforming the order for sale by the land administrator into that of the High Court …
>
> Since all the requirements to obtain the first order for sale of the land held under land office title had been duly complied with and no challenge had ever been made against it, the appellant could not at the originating summons stage question the merits of the first order of sale granted by the land administrator. The appellant could have appealed to the High Court under s 418 of the Code which she initially did only to withdraw it later. It follows therefore that the validity of the first order for sale cannot now be challenged.

[13] The learned High Court judge in the instant appeals found that the appellant had failed to serve on the respective respondent the necessary notices in Form 16D as required by s 254 of the Code and that the respondents were also not served with the summons to attend the enquiries before the land administrator. Hence, there was cause to the contrary and accordingly dismissed both applications for orders of sale under s 256(3) of the Code.

[14] The cases referred to by learned counsel for the appellant are clearly distinguishable as the borrowers in those cases were duly served with notices in Form 16D. In the instant appeals the respondents were not served with the notices in Form 16D. They were also not served by the land administrator with the summons to attend the enquiries held under s 261 of the Code and were never informed of the order of sale by the land administrator. Hence they could not exercise their right of appeal to the High Court under s 418 of the Code against the decision of the land administrator.

[15] Whilst it can be seen that an application to the court under s 265(3) of the Code is merely a continuation of the proceeding of transforming the order for sale by the land administrator into that of the High Court (*Lee Gee Pheng v RHB Bank Bhd*), we are of the view that the court is not obliged to make an order of sale under s 265(3) read with s 256 of the Code if it is satisfied that there is in existence cause to the contrary. Section 265(3A) clearly states that 'the Court may substitute for the order of the Land Administrator an order for sale under section 256, *or make such other order as it may think fit.*' (Emphasis added.) Although the power of the court to make an order for sale under s 256(3) of the Code is confined only to land held

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under the registry title, the court is immediately seized of jurisdiction to deal with the land held under the land office title upon reference by the land administrator. The court's power under s 256(3) of the Code is not only limited to substituting the order of sale of the land administrator with its own order of sale but it can decline to make an order of sale if it is satisfied of the existence of cause to the contrary. The court does not act as a mere rubber stamp and dutifully makes its own order of sale in place of the order of sale by the land administrator regardless of any statutory non-compliance under the Code.

[16] What is cause to the contrary? The Supreme Court (as it then was) in *Low Lee Lian v Ban Hin Lee Bank Bhd*, held that there were only three categories of cases which constitute cause to the contrary. The second category, which is pertinent to our case, is that the chargor may show cause to the contrary by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary.

[17] In these appeals we found, as an incontrovertible fact that the respondents had never been served with notices in Form 16D. They were also not served with the summons to attend the enquiries held by the land administrator under s 261 of the Code to show cause why the orders of sale should not be made against them nor were they informed of the decision of the land administrator. The appellant did not file any affidavit in reply to rebut the respondents' assertions. It has been held in *Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 AMR 622 at p 628 that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is normally treated as an admission by him of the fact so asserted. We are therefore of the view that the learned judge did not err in law or in fact in arriving at his decision. In the result we hereby dismiss both the appeals with costs and affirm the orders of the learned judge of the High Court. The deposits are to be paid to the respective respondents on account of taxed costs.

[18] Before we conclude, we have one observation to make. We note that the intitulement in the appellant's originating summonses refers to s 265(3)(c) of the Code, which was incorrect at the date of filing of the said summonses. Section 265(3)(c) had been amended and replaced by a new s 265(3) by the National Land Code (Amendment) Act 2001 (Act A1104)

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with effect from 1 December 2001, vide PU (B) 559/2001. As a result of the amendment, para (c) of s 265(3) had been deleted and is now substituted with a new sub-s (3A).

Appeals dismissed with costs.

Reported by Kanesh Sundrum